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IN THE
Supreme Court of the United States

October Term, 1972
No. 71-1637

THE CITY OF BURBANK, etc., *et al.*,

Appellants,

VS.

LOCKHEED AIR TERMINAL, INC., *et al.*,

Appellees.

On Appeal From the United States Court of Appeals
for the Ninth Circuit

Motion for Leave to File Supplemental Brief
Amicus Curiae

The State of California respectfully asks leave of the Court to file this supplemental brief *Amicus Curiae* in this cause on behalf of appellants, *City of Burbank, et al.*

Respectfully submitted,

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IN THE
Supreme Court of the United States

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THE CITY OF BURBANK, etc., et al.,

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vs.

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On Appeal From the United States Court of Appeals
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**Supplemental Brief of the State of California
Amicus Curiae in Support of Appellants
Interest of the Amicus**

The interest of the amicus is as set out in our brief
amicus curiae filed with this Court in July, 1972.

Summary of Supplemental Argument

The Congress by its enactment in October, 1972, of
the Noise Control Act of 1972 has reinforced the con-
tention of Appellants that the Federal Government
has not preempted the entire field of airport noise re-
duction.

ARGUMENT

I. Introduction

At the time Appellants filed their jurisdictional statement the State of California filed an amicus brief with this Court in support thereof. That brief was addressed to both the importance of the case and the merits. We ask that it be considered by the Court as our brief on the merits. This supplemental brief has only one purpose, to discuss the applicability of the subsequently enacted Noise Control Act of 1972, Public Law 92-574.

II.

Congress by Its Enactment of the Noise Control Act of 1972 Has Reinforced the Contention of Appellants That the Federal Government Has Not Preempted the Entire Field of Airport Noise Reduction

A. Congress by Enactment of the Noise Control Act Has Preempted (in Part) Product Noise, Railroad Noise, and Motor Carrier Noise, But Not Aircraft Noise

The President has just signed the Noise Control Act of 1972 (hereinafter NCA) into law. Pub. Law 92-574. (It is reproduced at 118 Cong. Rec. §§ 10295-10300 (daily ed. Oct. 18, 1972).) While it is a comprehensive noise control statute, we shall deal solely with the provisions pertinent to this case.

Congress found that "inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, . . ." NCA § 2(a)(1). It further found that the major sources include transportation vehicles and equipment. NCA § 2(a)(2). The Congress declared that it is "the policy of the United States to promote an environment for all Americans free

from noise that jeopardizes their health or welfare." NCA § 2(b). The Congress next found that while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce, control of which requires national uniformity of treatment. NCA § 2 (a)(3).

The Noise Control Act then proceeds to discuss noise limitations upon four categories of objects, as to three of which there exist partially preemptive provisions:

(1) "Products" (NCA § 3(3)—a category not including aircraft or its components). Regarding preemption—see NCA § 6(e).

(2) "Railroads" (NCA § 17). Regarding preemption—see NCA § 17(c).

(3) "Motor Carriers" (NCA § 18). Regarding preemption—see NCA § 18(c).

(4) "Aircraft" (NCA § 7). There is *no* provision for preemption.

We shall discuss these one by one.

(1) *Products*

The term "product" is defined as meaning any manufactured article or goods or component thereof excluding any aircraft, aircraft engine, propeller, or appliance, certain military equipment, certain rockets or equipment designed for NASA, and certain experimental machinery. NCA § 3(3). The Administrator of the Environmental Protection Agency shall publish information on the levels of noise requisite to protect the public health and welfare with an adequate margin of safety. NCA § 5(a)(2). He shall then identify the products or class of products which are the major sources of

noise. NCA § 5(b)(1). Thereafter he shall propose and prescribe regulations covering certain "products." NCA § 6(a), (b), and (c).

The following provision was adopted with respect to preemption:

"(e)(1) No State or political subdivision thereof may adopt or enforce—

(A) with respect to any new product for which a regulation has been prescribed by the Administrator under this section, any law or regulation which sets a limit on noise emissions from such new product and which is not identical to such regulation of the Administrator; or

(B) with respect to any component incorporated into such new product by the manufacturer of such product, any law or regulation setting a limit on noise emissions from such component when so incorporated.

(2) Subject to sections 17 and 18, nothing in this section precludes or denies the right of any State or political subdivision thereof to establish and enforce controls on environmental noise (or one or more sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products." NCA § 6(e).

(2) *Railroads*

The Administrator of the Environmental Protection Agency is charged with proposing and promulgating noise emission regulations for railroads. NCA § 17(a). The Secretary of Transportation is to promulgate regulations to insure compliance with the Administrator's standards. NCA § 17(b).

The following provision was adopted with respect to preemption:

"(c)(1) Subject to paragraph (2) but notwithstanding any other provisions of this Act, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

"(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restrict [sic.] is necessitated by special local conditions and is not in conflict with regulations promulgated under this section." NCA § 17(c).

(3) *Motor Carriers*

The Administrator of the Environmental Protection Agency is charged with proposing and promulgating noise emission regulations for motor carriers engaged in interstate commerce. NCA § 18(a). The Secretary of

Transportation is to promulgate regulations to insure compliance with the Administrator's standards. NCA § 18(b).

The following provision was adopted with respect to preemption:

"(c)(1) Subject to paragraph (2) of this subsection but notwithstanding any other provision of this Act, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any motor carrier engaged in interstate commerce, no State or political subdivision thereof may adopt or enforce any standard applicable to the same operation of such motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

"(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section." NCA § 18(c).

(4) *Aircraft*

The Administrator of the Environmental Protection Agency shall conduct a "study" of the:

"(1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft;

(3) implications of identifying and achieving levels of cumulative noise exposure around airports; and

(4) additional measures available to airport operators and local governments to control aircraft noise." NCA § 7(a).

He shall report on such study to designated Congressional committees. *Ibid.*

The Federal Aviation Act's section 611 (49 U.S.C. § 1431) adopted in 1968 is amended. NCA § 7(b).¹

¹Section 611 of the Federal Aviation Act (49 U.S.C. § 1431) as it was enacted in 1968 and before it was amended by the Noise Control Act read as follows:

"§ 1431. *Control and abatement of aircraft noise and sonic boom—Consultations; standards; rules and regulations*

"(a) In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of

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The Federal Aviation Administration's authority to prescribe standards for the measurement, control and abatement of aircraft noise is retained. *Ibid.* The following pertinent changes have been made in section 611.

such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter.

"Considerations determinative of standards, rules, and regulations"

"(b) In prescribing and amending standards, rules and regulations under this section, the Administrator shall—

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard, rule, or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard, rule, or regulation will contribute to carrying out the purposes of this section.

"Amendment, modification, suspension, or revocation of certificate; notice and appeal rights"

"(c) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards, rules, or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 1429 of this title, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the Administrator if it finds that control or abatement of aircraft noise or sonic boom and the public interest do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation."

Section 611 of the Federal Aviation Act as it has been amended by the Noise Control Act reads as follows:

The Federal Aviation Administration (FAA) retains such jurisdiction as it has to control and abate aircraft noise and sonic boom. FAA must now consult with the Environmental Protection Administration (EPA). The responsibility of FAA with regard to type

"Control and Abatement of Aircraft Noise and Sonic Boom

"Sec. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, and modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

"(2) The FAA shall not issue an original type certificate under section 603(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d).

"(c)(1) Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to pro-

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certification and noise is emphasized. EPA is now to propose regulations to FAA. FAA is to consider such proposals and decide whether or not to adopt them. EPA can request FAA to reexamine FAA's findings. The five considerations which FAA is to take into ac-

count protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within a reasonable time after the conclusion of such hearing and after consultation with EPA, the FAA shall—

“(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

“(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations.

“(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be

count remain essentially the same. Existing regulations continue in effect until modified. (118 Cong. Rec. 10296-10297 (daily ed. Oct. 18, 1972); compare with previously codified 49 U.S.C. § 1431.) In brief, as far as actual power is concerned, FAA retains essentially

published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

"(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 102(2)(C), the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

"(d) In prescribing and amending standards and regulations under this section, the FAA shall—

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

"(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certifi-

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the same authority with the same considerations that it had before the enactment of the Noise Control Act. EPA is given only a studying and proposing role.

B. Congress, by Deleting the Aircraft Noise Preemption Provision in the Senate Bill, Consciously Determined Not to Preempt the Field of Aircraft Noise

The legislative history of the enactment of the Noise Control Act of 1972 shows a conscious Congressional decision to delete aircraft noise preemption provisions. (118 Cong. Rec. H 1508-H1539 (daily ed. Feb. 29, 1972); 118 Cong. Rec. S 17743-17764, 17774-17785 (daily ed. Oct. 12, 1972); 118 Cong. Rec. S 17988-18014 (daily ed. Oct. 13, 1972); 118 Cong. Rec. H 10261-10263, 10287-10301, S. 18638-18646 (Oct. 18, 1972).)

In brief, the bill which passed the Senate contained a provision specifically preempting the field of aircraft noise regulation. The bill which passed the House con-

...kate holder shall have the same notice and appeal rights as are contained in section 609, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control of abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

"(c) All—

"(1) standards, rules, and regulations prescribed under section 611 of the Federal Aviation Act of 1958, and

"(2) exemptions, granted under any provision of the Federal Aviation Act of 1958, with respect to such standards, rules, and regulations, which are in effect on the date of the enactment of this Act, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrator of the Federal Aviation Administration in the exercise of any authority vested in him, by a court of competent jurisdiction, or by operation of law."

(118 Cong. Rec. H10296-10297 (daily ed. Oct. 18, 1972))

tained no such provision. The bill as enacted by Congress deleted the preemption provision.

To discuss the matter in greater detail, the bill which passed the Senate provided for preemption. (118 Cong. Rec. S. 18013 (daily ed. Oct. 13, 1972)—§ 505; *see* 118 Cong. Rec. S 17989 (daily ed. Oct. 13, 1972) (remarks of the Senator carrying the bill, Senator Tunney); *also see* 118 Cong. Rec. S. 17749, 17753 (daily ed. Oct. 12, 1972)—§ 506.) The bill as it passed the Senate contained the following provision:

"Sec. 505. No State or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof." (118 Cong. Rec. S 18013 (daily ed. Oct. 13, 1972).)

The bill which passed the House contained no such provision. (118 Cong. Rec. H 1523-1527 (daily ed. Feb. 29, 1972).) After conference the bill adopted by the Congress did not contain the Senate's provision preempting the field of aircraft noise reduction. (118 Cong. Rec. H 10295-10300 (daily ed. Oct. 18, 1972).) While the final bill as it relates to aircraft noise borrows some provisions from the Senate bill (greater authority to Environmental Protection Agency; study of aircraft noise by Environmental Protection Agency) and some from the House bill (ultimate authority in Federal Aviation Administration) the decision to omit the preemption of aircraft noise is conspicuous. Congress has made its conscious decision.²

²There appears to be no report of the conference committee. The report of the House committee on the bill in the form it originally passed the House stated that no provision of the bill

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C. Congress Has Directed Federal Agencies to (1) Act in Such a Manner as to Further the National Noise Reduction Policy and (2) to Comply With State and Local Noise Requirements

Congress has authorized and directed that Federal agencies shall to the fullest extent consistent with their authority carry out the programs within their control in such a manner as to further the national noise reduction policy. NCA § 4(a). That policy is to promote an environment for all Americans "free from noise that jeopardizes their health or welfare." NCA § 2(b).

Next, each department, agency, or instrumentality of the executive, legislative, and judicial branches of the federal government having jurisdiction over any property or facility or engaged in any activity resulting, or which may result, in the emission of noise "shall comply" with State and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements. NCA § 4(a) and (b). (The President may make specific exemptions. NCA § 4(b).)

was intended to alter in any way the relationship between Federal and State and local authority that existed with respect to section 611 of the Federal Aviation Act prior to enactment of the bill. (H.R. Rep. No. 92-842, 92d Cong., 2d Sess. 10 (1972).) The Senate bill as stated in the text explicitly provided for preemption. The Senate committee report stated that States and local governments were preempted from establishing or enforcing noise emission standards unless identical to federal ones, that the bill did not address the responsibilities or powers of airport operators, and that the existing relationships between the various levels of government under section 611 were not affected. (S. Rep. No. 92-1160, 92d Cong. 2d Sess. 10-11 (1972).) As stated above, we are aware of no report on the bill as it emerged from conference and was enacted.

In brief, it is the responsibility of every Federal agency (which includes the Federal Aviation Administration) to the "fullest extent consistent with their authority" to carry out a program of promoting an environment free from noise which jeopardizes the health and welfare of all Americans. (See NCA §§ 4(a), 2(b).) A noise shift rule adopted by an FAA tower chief which appears to have the effect of diverting noise to other populated areas while invalidating Burbank's noise limitation ordinance flatly contradicts the Congressional mandate. (See discussion in the Amicus Brief of the Attorney General of the State of California, pp. 18-20.)

Next, every federal agency (defined to include both executive and judicial branches) having jurisdiction over any property or facility or engaged in any activity resulting or which may result in the emission of noise shall comply with state and local requirements respecting the control and abatement of environmental noise. NCA § 4(b).

(1) First, to the extent that the FAA has jurisdiction over Hollywood-Burbank, it shall comply with the Burbank ordinance. This clearly means that the tower chief shall comply with the curfew.

(2) Second, to the extent that the FAA's regulatory activity may result in the emission of noise (i.e., by enabling noise at night otherwise prohibited), such activity by the FAA violates the command of Congress.

(3) Third, to the extent that Courts of the United States have jurisdiction by virtue of their

implementing the laws of the United States in regard to Hollywood-Burbank airport, they too must adhere to the Congressional mandate to comply with state and local requirements.

(4) Fourth, to the extent that the Courts by their decision-making are engaged in activity which may result in the emission of noise (i.e., by invalidating a noise control ordinance, thus permitting noise at night), they again must adhere to the Congressional command to comply with state and local requirements.

Conclusion

Congress has now spoken on the subject of noise. It spoke with respect to four categories of noise sources: (1) products, (2) railroads, (3) motor carriers, and (4) aircraft. Congress preempted (in part) with respect to the first three. Congress did not preempt with respect to aircraft.

The Senate proposed preemption of the field of aircraft noise. Congress as a whole deleted the Senate provision. The Congressional intent is not to preempt the field of aircraft noise.

Congress declared a policy of noise reduction. All federal agencies are mandated to adhere to that policy. All branches of government, including the executive and the judicial, having jurisdiction over any property or facility or engaged in activity which may result in the emission of noise shall comply with State and local noise abatement requirements.

Congress has now spoken. It did not preempt the Burbank ordinance. Quite to the contrary, it required federal agencies to abide by it.

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